

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SCOTT ALAN EYRICH,

Defendant-Appellee.

UNPUBLISHED
November 13, 2003

No. 240758
St. Clair Circuit Court
LC No. 01-002386-FC

Before: Bandstra, P.J., and Hoekstra and Borrello, JJ.

BORRELLO, J. (*dissenting*).

I respectfully dissent from the majority . I do not find that the trial judge's finding that the prosecutor tried to goad the defendant into a mistrial was clearly erroneous. In point of fact, I believe the trial judge's findings of fact and conclusions of law are accurate.

Defendant was charged with criminal sexual conduct in the first degree, victim under thirteen years of age, MCL 750.520b(1)(a), as a result of allegations made by complainant, his seven-year-old daughter. Before the trial began, defendant requested that the trial court suppress any evidence of pornographic material found in defendant's home. The trial court stated that it would consider the motion at a later time, and told the parties to refrain from mentioning the material. While examining her third witness, the prosecutor began to ask the witness about a search conducted in the home. After the prosecution witness testified that pornographic materials were found in defendant's home, defense counsel objected and later brought a motion for mistrial. The trial court granted the motion for mistrial, holding that the double jeopardy bar of the Michigan and United States Constitutions forbade retrial.

The basis for the trial court's decision involved the testimony of Barbara Butler, a child protective services worker and prosecution witness, who testified that she and a police officer went to defendant's home to investigate the allegations against defendant, and that she and another officer returned to the home two days later because additional concerns had arisen. She was given permission to look around the home and was shown certain items upon request. This was the second time the prosecutor asked the witness about what she found at the home. The questioning by the prosecutor went as follows:

Q. Did you return to the home on Richman Road after July 3rd?

A. Yes, we did.

Q. And who's we?

A. Myself and Detective Jacobson.

Q. When you returned to the home on Richman Road, what was your purpose two days later?

A. Thereafter processing everything that we had done, there were some additional concerns in speaking with the other professionals that we wanted to look at.

Q. .When you went back to the home, did you ask or inquire as to whether or not you could look around?

A. Yes.

Q. Were you allowed to look around?

A. Yes.

Q. What areas were you in?

A. We had gone back into the office which is the room like I said that we were concerned about to begin with. And apparently while we were in that room, Officer Duvall had noticed some pornographic materials so we had gone---

Defense counsel interrupted with an objection. When asked by the trial court whether the prosecution had any other questions of the witness her response was "Thank you. That was the last area I wanted to cover, your Honor." Defense counsel thereafter began his cross-examination of the witness.

The following day defendant moved for a mistrial based on the testimony that pornographic material was present in the home. The trial court reviewed the transcript from the previous day, observed that the prosecution's questions seemed designed to introduce evidence that pornographic material was present in the home, and granted defendant's motion for a mistrial.

Subsequently, defendant moved to dismiss the case based on double jeopardy. He argued that his motion for a mistrial was necessitated by the prosecutor's intentional misconduct in introducing evidence regarding the presence of pornographic material in the home. The trial court granted the motion, concluding that based on the objective facts, the prosecutor's intentional misconduct forced defendant to move for a mistrial, and that retrial was barred under the circumstances.

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. Unless the defendant consents to the interruption of the trial or a mistrial is declared due to manifest necessity, the defendant cannot be brought to trial again. *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). A mistrial granted on the defendant's own motion or with his consent, unless prompted

by prosecutorial conduct intended to provoke the mistrial request, waives double jeopardy protections. *Oregon v Kennedy*, 456 US 667, 675-676; 102 S Ct 2083; 72 L Ed 2d 416 (1982); *People v Lett*, 466 Mich 206, 215; 644 NW2d 743 (2002); *People v Dawson*, 431 Mich 234, 253; 427 NW2d 886 (1988). In determining a prosecutor's intent, the trial court should rely on the objective facts and circumstances. Its findings will not be disturbed on appeal unless they are clearly erroneous. *Dawson, supra*, 254, 258

This case presents a mixed question of fact and law. This court reviews factual findings under the clearly erroneous standard. MCR 2.613(C); *Dawson, supra* at 254, 258.

We review questions of law *de novo*. *People v Tracey*, 221 Mich App 321, 323, 324; 561 NW2d 133 (1997).

In accordance with MCR 2.613(C), and *Dawson, supra*, to overturn the factual findings of the trial court we must find that the court's finding of fact were clearly erroneous. That finding must be predicated on the objective facts and circumstances of the particular case. In this case, once the prosecutor elicited evidence of the pornographic material, she had no additional questions for the witness. In fact, as the trial court pointed out in its opinion, after the prosecutor elicited the evidence, her remark was, "That was the last area I wanted to cover." Clearly, the prosecutor sought to elicit evidence of the presence of pornographic materials. Predicated on the prosecutor's tacit admission of ignoring the trial court's order regarding introduction of evidence of the presence of pornographic materials "that was the last area I wanted to cover" the trial court properly held her conduct constituted intentional prosecutorial misconduct.

The trial court has a unique perspective and ability to judge the credibility not only of witnesses, but also of attorneys who routinely practice before it. Accordingly, we should be bound by and adhere to the trial court's factual finding of intentional prosecutorial misconduct.

The trial court relied on *Dawson, supra*, to reach the decision that the Michigan and federal Constitutions' prohibition against double jeopardy applied to this case. In *Dawson, supra*, our Supreme Court stated:

Retrials are an exception to the general double jeopardy bar. Where a mistrial results from apparently innocent or even negligent prosecutorial error, or from factors beyond his control, the public interest in allowing a retrial outweighs the double jeopardy bar. The balance tilts, however, where the judge finds, on the basis of the "objective facts and circumstances of the particular case," that the prosecutor intended to goad the defendant into moving for a mistrial.

Ordinarily a trial judge will determine whether the prosecutor intended to goad the defendant into moving for a mistrial. The judge's findings are subject to appellate review under the "clearly erroneous" standard. [*Dawson, supra* at 257-258.]

I would affirm the trial court's reliance upon *Dawson, supra*, to this case. Like the fact pattern in *Dawson*, the prosecutor here was trying to elicit testimony that she clearly knew to be improper. There is no question that the prosecution wanted the fact of the presence of

pornographic materials at defendant's home to be introduced into evidence. Having already questioned the witness about what items were found in defendant's computer room during the first search, she returned to the same line of questioning about what was found during the second search. The prosecutor did not have any questions following solicitation from the witness of finding pornographic materials. Hence, the only reason to engage in such a line of questioning was to goad the defense into requesting a mistrial.

I am not unmindful of the fact that prosecutors play an extremely important role in the jurisprudence of this state. Their duty is to both protect the interests of the people of this state and ensure that justice is achieved in every case they handle. It is a difficult balance, but one that is mandated by our Constitutions. However, when a prosecutor engages in conduct that the trial court finds was an intentional exercise to goad the defense into requesting a mistrial, neither the interests of the people of this state or the interests of the justice are well-served.

Thus, I dissent.

/s/ Stephen L. Borrello